Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LEE YEAGER,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a job applicant who would have been hired "but for" the employer's race/gender-based denial of his equal access to its training program has "standing" to complain of that denial.

II.

What constitutes a prima-facie case of "reverse" employment discrimination under Title VII?

III.

Does Title VII permit a private, voluntary race/gender-conscious affirmative action plan designed to indefinitely maintain certain percentages of minorities and women in the employer's workforce without regard to [or in excess of] their concomitant percentages in the local workforce?

IV.

May an employer having a large majority, albeit not disproportionate number of white men in its workforce engage in rank, race/gender discriminatory employment practices because it is not "that unusual employer who discriminates against the majority?"

V.

Does a private federal contractor's apprenticeship subjection to the Dept. of Labor's "affirmative action" scheme constitute sufficient government involvement for purposes of subjecting

its discriminatory employment practices to Fifth Amendment scrutiny?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Lee Yeager, an individual citizen of the United States, residing in the Northern District (Eastern Division) of Ohio. Petitioner has no corporate affiliations. He was Plaintiff in the District Court and Appellant in the Sixth Circuit Court of Appeals.

Respondent

Respondent is General Motors Corporation, a corporation having publicly-traded stock. Petitioner is unaware of any publicly-held company owning ten percent (10%) or more of GMC stock. Respondent was Defendant in the District Court and Appellee before the Sixth Circuit Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 7

The U.S. Court of Appeals for the Sixth Circuit Has Decided Very Important Questions of Federal Law Which Have Not Been, But Should Be Settled By This Court 7

CONCLUSION 11

APPENDIX:

Appendix A
Court of Appeals Order Denying Petitions for Rehearing, 11/1/01 . . . . . 1a

Appendix B
Court of Appeals Opinion, 9/7/01 . . . . . 3a

Appendix C
District Court Memorandum Opinion and Order
[Granting Partial Summary Judgment on Original
Title VII Claim and Both Fifth Amendment
Claims of Supplemental Amended Complaint],
6/30/99 . . . . . 19a

Appendix D
District Court Memorandum Opinion and Order
[Granting Defendant's Motion for Summary
Judgment on Count 3 of Supp. Amended
Complaint], 12/20/99 . . . . . 32a

Appendix E
Constitutional and Statutory Provisions Involved 40a

Respondent's 5/7/97 "Availability and Utilization
Figures" letter to U.S. Dept. of Labor,
Bureau of Apprenticeship and Training 43a

TABLE OF AUTHORITIES

Cases

Hazelwood School District v. United States,
433 U.S. 299, 53 L.Ed.2d 768 (1977) 10

Johnson v. Transportation Agency,
480 U.S. 616, 94 L.Ed.2d 615 (1987) 10

Kipp v. LTV Aerospace & Def.,
838 F.Supp. 289 (N.D. Texas 1993) 10

McLaughlin v. Great Lakes Dredge & Dock Co.,
495 F.Supp. 857 (N.D. Ohio 1980) 10

NCAA v. Tarkanian,
488 U.S. 179, 102 L.Ed.2d 469 (1988) 10

Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656, 124 L.Ed.2d 586 (1993) 7

North Georgia Fishing, Inc. v. Di-Chem, Inc.,
419 U.S. 601, 42 L.Ed.2d 751 (1975) 10

Parker v. Baltimore & Ohio RR. Co.,
652 F.2d 1012 (D.C. Cir. 1981) 8

Plott v. General Motors Corp.,
71 F.3d 1190 (6th Cir. 1995) 517 U.S. 1157,
135 L.Ed2d. 649 (1966) 3

Steelworkers of America v. Weber,
443 U.S. 193, 61 L.Ed.2d 48 (1979) 8

Teamsters v. United States,
431 U.S. 324, 52 L.Ed.2d 396 (1977) 10

University of California Regents v. Bakke,
438 U.S. 265, 57 L.Ed.2d 750 (1978) 7

Statutes

28 U.S.C. §1254(1) 1
42 U.S.C. 2000e 1, 2

Other Authorities

Supreme Court Rules 13.1 and 13.3 1
Title 29 Part 30 CFR § 30.1 . . . . . 1, 2
Title 41 Part 60 CFR, §60.1-1 . . . . . 1, 2
U.S. Constitution, Fifth Amendment 1, 2, 10

OPINIONS BELOW

The Sixth Circuit Opinion (Apx. A at 1a) is reported at 265 F.3d 389 (6th Cir. 2001), 2001 FED App. 0311P (6th Cir. 2001). The 6/30/99 District Court Opinion (Apx. B at 14a) is reported at 67 F.Supp.2d 796 (ND Ohio ED 1999); and the 12/20/99 District Court Opinion (Apx. B at 27a) is not reported.

JURISDICTIONAL STATEMENT

The judgment of the Sixth Circuit Court of Appeals was entered 9/7/01. The Court of Appeals then entered an order denying a timely Petition for Rehearing, with Suggestion for Rehearing En Banc, on 11/1/01.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1); and the timeliness of Petitioner's filing is governed by Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. §2000e, Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment. In particular, allusion is made to §2000e-2(a) and 2(d).

The case also involves the degree to which involvement with the federal government will cause a private concern to become a "federal actor" for purposes of subjecting its conduct to Fifth Amendment constraints. Here, reference is made to Title 41, Part 60 of the Code of Federal Regulations ("CFR") and Title 29, Part 30, CFR, §30.1, together with the Fifth Amendment to the U.S. Constitution.

STATEMENT OF THE CASE

42 U.S.C. §2000e and the U.S. Constitution's Fifth Amendment provided the federal jurisdictional predicate for this Title VII/"Bivens" employment discrimination action originally brought in the U.S. District Court for the Northern District of Ohio (Eastern Division). There, class action certification was deferred and the case was dismissed on summary judgment. That dismissal was affirmed on appeal to and rehearing denial in the U.S. Court of Appeals for the Sixth Circuit. This Court's plenary review is now sought on petition for writ of certiorari.

Respondent, General Motors Corporation ("GM"), is a federal contractor having an apprenticeship program. As such, it is subject to the U.S. Department of Labor's "affirmative action" requirements contained in Title 41, Part 60 of the Code of Federal Regulations ("CFR") and in Title 29, Part 30, CFR, respectively administered through the Department's Office of Federal Contract Compliance Programs ("OFCCP") and Bureau of Apprenticeship and Training ("BAT").

In 1983, GM, its employees' union and the Equal Employment Opportunity Commission entered into a Conciliation Agreement that provided for GM to "make good faith efforts to assure that minorities are at least 15.5% of those chosen for apprenticeship openings, and women are at least 12.0%." Further, GM would "provide preapprentice training for minorities and women at selected facilities where openings are anticipated in the foreseeable future." By its

own terms, that Agreement terminated 12/31/88.[1]

Despite the Conciliation Agreement's termination thirteen years ago and without regard to[2] local workforce percentage availability, GM has maintained fixed percentages of minorities and women in its skilled-trades apprenticeship job class through a number of s -called "reverse" discriminatory practices in its apprentice selection process. Among those practices are "Targeting" and a "Preapprentice Training Program" ("PATP").

Targeting. [For By-Passing the "Random Draw"]. For interested "nonseniority" individuals such as Petitioner Yeager, "targeting" occurs at the inception of the selection process[3] after the candidates' basic qualifications, race and gender are determined. Only minority and female candidates deemed "highly qualified," together with a designated number randomly-drawn from the remaining pool of candidates, advance to the apprenticeship orientation and application session. To the candidates who are not randomly drawn, no further consideration is given.

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[1] For additional historical background, see *Plott v. General Motors Corp.*, 71 F.3d 1190 (6th Cir. 1995), cert. denied, 517 U.S. 1157, 134 L.Ed.2d 649 (1996).

[2] Often, "in excess of ..."

[3] GM represents its apprentice selection process to consist of a "random draw" of apprentice candidates; their invitation to an orientation and application session; completion of apprentice applications, whereon up to 3 desired trades are selected by the applicant; an award of up to 72 "apprentice selection points" for test and interview scores; and apprentice hiring from trades list comprised of the applicants' descending-order total selection points.

PATP. PATP occurs after the apprentice applicants are descending-order ranked, on unpublished apprentice selection lists in the respective trades, according to their combined test and interview scores – (72 maximum "total selection points)."

Before hiring from the top of those lists, GM conducts a "race" and "sex" analysis to determine whether the prospective hirees will include enough minorities and females to meet its perceived "affirmative-action" percentage requirements. If those percentages are "deficient," hiring is suspended to conduct PATP, a training program available only to "near-selective" minority and female apprentice applicants, designed to percolate sufficient numbers of them upward and into the lists' selective range. Below, the district court judge observed:

> "First, PATP is not a training program. Rather PATP is a system affording women and minorities the opportunity to earn up to seven bonus points. Applicants are selected for PATP based on how close their scores are to the selection range, not on any real measuring skill or need for training. Also, the manner in which points are added to the applicant's Total Selection Points suggests a motive for Pre-Apprentice Training other than education. The bonus that is granted at the end of the program is a value based on performance on a test of the same nature as the original written test taken during the application process. The addition is computed in such a way that even if the applicant's score on the test decreases, his Total Selection Points increase. This suggests that the purpose of the evaluation at

> the end of the program is not to truly re-assess the applicant's ability, but to increase the applicant's score."

After PATP, GM hires its apprentices from the so-called "updated" apprentice selection lists.

Petitioner, Lee Yeager, was and remains a white male apprentice applicant. Having been randomly drawn for further apprenticeship participation, he advanced through the "interview" stage of the selection process at GM's Lordstown Assembly facility in 1991, 1993 and 1996. Because of his race and gender, Yeager was not invited to PATP conducted there in 1991 and 1993; and literally refused PATP participation in 1996.

Before PATP at Lordstown Assembly in 1996, the respective "total selection points" of minorities, Carl Kirksey and Hector David Colon, were 58 and 59 in the millwright trade. Yeager scored 60 in that trade. Due to their "minority" status, Kirksey and Colon were both invited to and participated in PATP. Both received the usual 7 "bonus" points, supra; and both were hired as millwright apprentices with respective, "updated" scores of 65 and 66. GM told Yeager that PATP was designed for "women and minorities only" participation, and denied his PATP request. To this day, Yeager's 60 score remains on the millwright apprentice selection list at Lordstown Assembly.

Petitioner Yeager is also a "highly-qualified" apprentice candidate; and, as requested, provided his qualifications, race and gender to GM for apprenticeship at its Lordstown Fabrication plant in 1997. Despite his "high" qualifications, Yeager was not among the 22 candidates "targeted" for further consideration because of his race and

gender; and was not randomly-drawn to advance at Fab Plant.

Had he been "targeted," his existing "60" score on Assembly's millwright apprentice list, "updated" to a 67 had he not been denied PATP participation there in 1996, would have transferred and he would have been hired as a millwright at Fab Plant on 5/24/99.

Despite record evidence that in every one of Lee Yeager's selected trades at Lordstown Assembly in 1996, GM percentage-hired far more minority and female apprentices than were available for hiring from the local workforce,[4] the Sixth Circuit supported its rejection of Yeager's prima-facie case of "reverse" discrimination with the following comment:

> "There is no evidence that GMC is the unusual employer that discriminates against the majority. The apprentice program's overall rankings reveal that twenty-three of the top twenty-five nonseniority candidates for Millwright were white men, twenty-eight of the top thirty nonseniority candidates for Pipefitting were white men, and twenty-four of the top twenty-five nonseniority candidates for Tool Making were white men. In fact, eighty percent of the apprenticeships in Yeager's selected trades were awarded to white men. Therefore, the district court did not err when it granted summary judgment in favor of GMC on Yeager's Title VII claims concerning the Assembly Plant because there is no evidence that GMC discriminates against white men in

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[4] See Respondent's 5/7/97 letter to BAT (Apx. D at 38a).

the administration of its apprentice program."

ARGUMENT
OF
IMPORTANT QUESTIONS OF FEDERAL LAW

I.

(Standing)

In denying Petitioner standing to complain despite his "but for" demonstration of injury-in-fact and causation, the Sixth Circuit erred under the appropriate "standing" analysis of *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 124 L.Ed.2d 586 (1993); and flat-out ignored this Court's fn. 14 observation in *University of California Regents v. Bakke*, 438 U.S. 265, 57 L.Ed.2d 750 (1978):

> "Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. (Authority omitted) The trial court found such an injury, apart from the failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence the constitutional requirements of Article III were met. The question of Bakke's admission vel non is merely one of relief."

Here applied to Respondent's "Targeting" practice, Petitioner's standing derives from Respondent's "decision not to permit [Yeager] to compete for all [apprentice applications, including those reserved for the highly-qualified, targeted candidates], simply because of his race [and gender]."

Turning to PATP, if permitted equal access thereto at Lordstown Assembly in 1996, Petitioner enjoys standing by either joining Kirksey and Colon at that facility's 1996 millwright apprentice class; or by transferring his "updated" 67 score to Fab Plant for hiring there on 5/24/99.

II.

("Reverse" Discrimination Prima-Facie Case)

Below, the Sixth Circuit ultimately relied on *Parker v. Baltimore & Ohio RR. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981) to impose the "unusual employer who discriminates against the majority" requirement for making a prima-facie case of "reverse" discrimination.

The time has come for this Court to either endorse that wholesale requirement or articulate an appropriate "direct" v. "indirect" evidence model for prima-facie cases of such discrimination.

III.

(Private, Voluntary Affirmative Action Plans)

Perhaps it is also time for the Court to update *Steelworkers of America v. Weber*, 443 U.S. 193, 61 L.Ed.2d 48 (1979) here, where Respondent's affirmative action plan, stripped of its Conciliation Agreement insulation, has

wandered aimlessly for the last thirteen years, subordinating relative abilities and qualifications to numerical positioning; "overutilizing" the minority and female workers in the local workforce; and having no light at the end of its tunnel.

IV.

(Exactly Who is That "Unusual Employer?")

The danger inherent in the Sixth Circuit's comment:

> "There is no evidence that GMC is the unusual employer that discriminates against the majority. The apprentice program's overall rankings reveal that twenty-three of the top twenty-five nonseniority candidates for Millwright were white men, twenty-eight of the top thirty nonseniority candidates for Pipefitting were white men, and twenty-four of the top twenty-five nonseniority candidates for Toolmaking were white men. In fact, eighty percent of the apprenticeships in Yeager's selected trades were awarded to white men."

is twofold. First, since it was made in a sea of "direct" evidence of Respondent's discriminatory employment practices, the comment could be interpreted to mean that "reverse" race/gender discrimination is not unlawful so long as it's practiced by an employer having a given-percentage majority (80%?) of white men in its workforce or job classifications.

And second, by relying on race/gender numbers and percentages in a given employer's workforce without comparison to their counterpart availability in the local

workforce, the comment removes the "manifest imbalance" lynchpin from traditional affirmative action analysis. *Johnson v. Transportation Agency*, 480 U.S. 616, 94 L.Ed.2d 615 (1987), at 632 relying on *Teamsters v. United States*, 431 U.S. 324, 52 L.Ed.2d 396 (1977); *Steelworkers, supra*; and *Hazelwood School District v. United States*, 433 U.S. 299, 53 L.Ed.2d 768 (1977).

V.

(Fifth Amendment Federal Actor)

McLaughlin v. Great Lakes Dredge & Dock Co., 495 F.Supp. 857 (N.D. Ohio 1980) and *Kipp v. LTV Aerospace & Def.*, 838 F.Supp. 289 (N.D. Texas 1993) were the authorities on which the Sixth Circuit relied to reject the notion that Respondent's relationship with OFCCP and BAT is sufficient to imbue sufficient federal action for subjecting its employment practices to Fifth Amendment review. Two district court cases.

Perhaps it is also time for this Court to consider that notion for plenary guidance on an important constitutional issue, especially since the Sixth Circuit's decision appears at odds with the "federal actor" ratio decidendi of *NCAA v. Tarkanian*, 488 U.S. 179, 102 L.Ed.2d 469 (1988) and *North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751 (1975).

CONCLUSION

For these reasons, the Court should grant the Petition.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

00-3026

[November 1, 2001, Filed]

LEE YEAGER, *Plaintiff-Appellant*,

v.

GENERAL MOTORS CORPORATION, *Defendant-Appellee*.

JUDGES:

BEFORE: NORRIS, SILER, and BRIGHT, * Circuit Judges.

* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

OPINION

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-3026

[September 7, 2001, Filed]

LEE YEAGER, *Plaintiff-Appellant*,

v.

GENERAL MOTORS CORPORATION, *Defendant-Appellee*.

Appeal from the United States District Court
for the Northern District of Ohio at Youngstown
No. 98-02478
Peter C. Economus, District Judge

JUDGES:

Before: NORRIS, SILER, and BRIGHT, Circuit Judges. *

* The Honorable Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION

BRIGHT, Circuit Judge.

When Lee Yeager ("Yeager") was not selected for General Motors Corporation's ("GMC's") apprentice program he sued, alleging that GMC discriminated against him on the basis of his race and sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, and the Fifth Amendment of the United States Constitution. The district court[1] granted summary judgment in favor of GMC.

On appeal, Yeager argues that the district court erred when it determined that he lacked standing to make his Title VII race and sex discrimination claims against GMC and that GMC did not violate Yeager's equal protection rights under the Fifth Amendment's Due Process Clause because GMC's apprentice program did not arise under color of law. For the reasons discussed below, we **AFFIRM**.

I. JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331. We have jurisdiction under 28 U.S.C. §1291. Yeager's notice of appeal was timely filed.

II. BACKGROUND

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[1] The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio.

GMC recruits applicants into its skilled trade positions (e.g., Truck Repair, Tool Making) through its apprentice training program ("apprentice program"). GMC administers its apprentice program in compliance with its collective bargaining agreement with the International Union UAW ("UAW").

GMC seeks apprentice applicants by publishing notices with information about the program and the application process. White males interested in the apprentice program must submit applications. GMC accepts a limited number of applications each hiring period on a first-come, first-serve basis. GMC sends completed applications to an independent firm that randomly selects a specified number of applicants who are then permitted to take a written examination. In addition, GMC seeks qualified minority and female applicants to the apprentice program through its contacts with local minority and female employment organizations. Each applicant lists the top three skilled trades for which they want to be considered.

White male applicants that are randomly selected take a written exam that evaluates their general abilities in areas such as mathematics and reading comprehension. Recruited minority applicants and female applicants are permitted to take the written examination without being randomly selected. If an applicant has previously taken an exam at another GMC plant, and is randomly selected, the applicant may have their previous test score transferred.

Applicants are ranked by their written exam score. The top thirty percent of minority applicants, female

applicants, and white male applicants are interviewed. Applicants receive another score for their interview performance.

Applicants receive an overall ranking for each skilled trade based on the sum of their written test and interview scores. The highest possible score is seventy-two. Apprenticeship selections are based solely on the applicants' total scores.

GMC keeps separate lists for seniority applicants and nonseniority applicants pursuant to the terms of its collective bargaining agreement with the UAW. Thus, for every two seniority applicants offered apprenticeships, only one nonseniority applicant may be offered an apprenticeship.

Applicants' ranked positions on the seniority and nonseniority lists may change in the following three ways: (1) as new applicants are tested and added to the list; (2) as applicants are selected for apprenticeships and taken off the list; and (3) when applicants are allowed to retest and the overall rankings are readjusted. The initial overall rankings for each skilled trade are generated without regard to race or sex. However, minority and female applicants may attempt to increase their total scores by participating in GMC's Pre-Apprentice Training Program ("training program") and the overall rankings are adjusted accordingly.

GMC conducts a training program for minority and female applicants whose scores are near the selection range. The training program provides additional training to minority and female apprentice program candidates. Following their training, minority and female applicants may take a written

test that may improve their total score by up to seven points. However, the training program participants may not receive a total score exceeding the maximum possible score of seventy-two. The training program's participants' test points are added to their total scores, and the overall rankings are adjusted accordingly.

Yeager is a nonseniority white male. He applied to the apprentice program at GMC's Lordstown Assembly Plant in 1989. He took his first written exam in 1989 and was interviewed in 1990 for his selected three positions (Truck Repair, Tool Making, and Pipefitting). He attained his highest score, fifty-three, in Truck Repair. In 1991, four seniority positions and one nonseniority position in Truck Repair became available. The nonseniority position was filled by a white male with a score of sixty-eight, fifteen points higher than Yeager's score. In 1993, a new apprentice class was selected, but only two seniority and no nonseniority positions opened in Truck Repair.

In 1996, Yeager exercised his option to retake the written exam and changed his Truck Repair preference to Millwright. After his interviews, Yeager achieved a total score of sixty in Millwright, fifty-seven in Tool Making, and fifty-five in Pipefitting. Later that year, GMC selected apprentices for its Assembly Plant. Thirteen seniority and six nonseniority Millwright apprenticeships became available. Six seniority and three nonseniority Pipefitting apprenticeships became available. Three seniority and one nonseniority Tool Making apprenticeships became available. Yeager's total score placed him fourteenth among the nonseniority white males for Millwright, twenty-fourth for Pipefitting, and thirty-sixth for Tool Making. The top fifty candidates for the

apprentice positions were all white males and Yeager was not among them. After the training program points were factored into the overall rankings, thirty-eight white males were accepted into the apprentice program. Women and minorities who had scores lower than Yeager's before they participated in the training program were selected for the apprenticeship program.

In 1997, Yeager applied to the apprentice program at GMC's Lordstown Fabrication Plant. The Fabrication Plant is a separate facility from the Assembly Plant and it has its own, separate, apprentice program. Applicants with a previous score at another GMC facility may have their total score applied to the Fabrication Plant apprentice program but they must first go through the random selection process. Yeager was not randomly selected for the nonseniority applicant list and, therefore, his scores were not transferred.

Yeager filed a complaint against GMC alleging violations of Title VII and the Fifth Amendment in relation to the administration of the apprentice program at the Assembly Plant. Later, he filed an amended complaint making Title VII and Fifth Amendment claims in relation to the administration of the apprentice program at the Fabrication Plant. The district court first granted GMC's motion for partial summary judgment on Yeager's Title VII claims in relation to the Assembly Plant and on Yeager's Fifth Amendment claims in relation to both Plants. Then, the district court granted GMC's motion for summary judgment in relation to Yeager's Title VII claims regarding the Fabrication Plant. Yeager filed a timely notice of appeal. On appeal, Yeager argues that he has standing to raise his Title VII claims and GMC's apprentice program constitutes action under color of law and,

therefore, GMC should be susceptible to his Fifth Amendment claims.

III. DISCUSSION

We review the district court's grant of summary judgment de novo. *Taylor v. Mich. Dept. of Corr.*, 69 F.3d 76, 79 (6th Cir. 1995). We view the evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). Summary judgment is proper if the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A.

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. U.S. CONST. art. III, §2. The cases-or-controversies requirement has the following three elements: (1) an injury in fact, (2) a causal relationship between the challenged conduct and the injury, and (3) a likelihood that the injury will be redressed by a favorable decision. *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663-64, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993). To show an injury in fact "in the context of affirmative action programs, the challenger need only show that, but for the program, he would have been considered for the job . . . ." *Brunet v. City of Columbus*, 1 F.3d 390, 397 (6th Cir. 1993).

Yeager argues that he satisfied the injury in fact requirement for his Title VII claims regarding GMC's Assembly Plant because he suffered three distinct injuries. First, Yeager argues he has been injured because training program points awarded to minority and female apprentice candidates will adversely affect his future ranking. To demonstrate an injury in fact a plaintiff "must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged . . . conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983) (internal quotations omitted).

The district court determined that Yeager's potential future injury was too speculative to satisfy Article III's standing requirements. We agree. Any possible injury to Yeager's future ranking is not imminent. GMC may terminate its training program at any time. Future nonseniority apprentice applicants may achieve higher unadjusted scores than Yeager's and prevent him from becoming an apprentice regardless of the training program. Therefore, Yeager's claim of potential future injury is too speculative to grant him standing.

Second, Yeager argues that he was injured because he

did not receive an apprenticeship in 1996.[2] To satisfy Article III's cases-or-controversies requirement there must be a causal relationship between the challenged conduct and the injury. *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. at 663-64.

The district court determined that, regardless of the training program, Yeager would not have received an apprenticeship in 1996 and, therefore, that no causal connection existed between GMC's training program and Yeager's alleged injury. We agree. Yeager was not injured within the meaning of Article III because GMC hired fifty apprentices in 1996 and fifty candidates with higher unadjusted scores outranked Yeager. Thus, GMC's training program did not prevent Yeager from obtaining an apprenticeship. Therefore, there is no causal connection between GMC's training program and Yeager's alleged injury of failing to receive an apprenticeship.

Third, Yeager argues that he suffered an injury in fact because he was not allowed to participate in the training program in 1996. In support of his standing argument, Yeager relies upon *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). In *Bakke* a white male applicant claimed the medical school's special admissions program violated the Fourteenth Amendment's Equal Protection Clause because sixteen of one hundred seats

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[2] In his brief, Yeager argued that he suffered injury in 1991, 1993, and 1996. However, Yeager conceded at oral argument that he lacks standing for his 1991 and 1993 claims. Therefore, we address solely Yeager's 1996 claim.

were reserved for disadvantaged minority students. The Court addressed Article III's standing requirements before it reached the merits of Bakke's Equal Protection claim. The Court determined that it was not necessary for Bakke to show that he would have been admitted without the reservation of seats, because standing may be established if the plaintiff is not given the opportunity to compete for all of the available slots. *Id.* at 281 n.14. Yeager insists that he has standing to challenge his exclusion from GMC's training program under Bakke's injury in fact analysis because no white males may participate in GMC's training program.

The district court distinguished *Bakke* on the basis that the 1996 training program was not an educational program. The court determined that the 1996 training program merely afforded minorities and females the opportunity to earn up to seven extra total points. The district court concluded that Yeager failed to show he was excluded from a program that he was entitled to because the training program was not an educational program. However, regardless of whether the district court's attempt to distinguish *Bakke* succeeds, Yeager lacks standing under Article III's cases-or-controversies requirement.

Our Article III standing analysis focuses on whether Yeager has shown that, but for the training program, he would have been hired for an apprenticeship. *See Brunet v. City of Columbus*, 1 F.3d at 397 (holding that to have standing "in the context of affirmative action programs, the challenger need only show that, but for the program, he would have been considered for the job . . . ."). Yeager's exclusion from the training program is relevant for this case only as it relates to GMC's failure to hire him as an

apprentice. The record shows that Yeager alleged in his complaint that GMC violated Title VII and the Fifth Amendment when it refused to hire him into its apprentice program. Yeager's complaint seeks injunctive relief eliminating the training program precisely because Yeager's complaint is predicated on the assumption that, but for the training program, he would have been hired for an apprenticeship. GMC's failure to accept Yeager into the training program does not constitute an injury in fact because it is not causally related to his alleged injury in this case--his exclusion from the apprentice program. We have already determined that, regardless of the training program, Yeager would not have received an apprenticeship in 1996 and, therefore, he was not injured within the meaning of Article III because there is no causal connection between GMC's training program and Yeager's alleged injury.

B.

However, even if we assume, for the sake of argument, that Yeager had standing to bring a Title VII action concerning GMC's Assembly Plant apprentice program, such action would not stand on the merits because Yeager cannot establish a prima facie case of reverse discrimination. We recognize that the district court did not reach this issue. However, this court can affirm a grant of summary judgment on a ground presented to the district court if the opposing party had a chance to respond. *Fox v. Van Oosterum*, 176 F.3d 342, 352-53 (6th Cir. 1999) (citing *Herm v. Stafford*, 663 F.2d 669, 684, n.21 (6th Cir. 1981) ("An appellate court can find an alternative basis for concluding that a party is entitled to summary judgment . . . provided it proceeds carefully so the opposing party is not denied an opportunity

to respond to the new theory.")). GMC presented this issue to the district court in its motion for summary judgment and Yeager had a chance to respond. Therefore, we can consider whether Yeager has established a prima facie case of reverse discrimination.

A prima facie case of reverse discrimination is established upon a showing that "'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority' . . . and upon a showing that the employer treated differently employees who were similarly situated but not members of the protected group." *Murray v. Thistledown Racing Club*, Inc., 770 F.2d 63, 67 (6th Cir. 1985) (quoting *Parker v. Baltimore & Ohio R.R. Co.*, 209 U.S. App. D.C. 215, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). GMC maintains there is no evidence supporting an inference that it discriminates against white men in the administration of its apprentice program. We agree.

There is no evidence that GMC is the unusual employer that discriminates against the majority. The apprentice program's overall rankings reveal that twenty-three of the top twenty-five nonseniority candidates for Millwright were white men, twenty-eight of the top thirty nonseniority candidates for Pipefitting were white men, and twenty-four of the top twenty-five nonseniority candidates for Tool Making were white men. In fact, eighty percent of the apprenticeships in Yeager's selected trades were awarded to white men. Therefore, the district court did not err when it granted summary judgment in favor of GMC on Yeager's Title VII claims concerning the Assembly Plant because there is no evidence that GMC discriminates against white men in the

administration of its apprentice program.

C.

The district court determined that Yeager lacked standing to raise his Title VII claims concerning GMC's 1997 apprentice program at its Fabrication Plant. Yeager argues that he has standing because he satisfied Article III's injury in fact requirement. The record shows that Yeager was never a viable apprentice program candidate because his application was not randomly selected to be included on the Fabrication Plant nonseniority applicant list. Minority and female candidates are not subjected to the random selection process. Yeager argues that his scores would have been transferred to the Fabrication Plant except for his race and sex, and that if his scores had been transferred, he would have been selected as a Millwright apprentice.

Whether Yeager's scores would have been transferred but for his race and sex is inapposite. The relevant question for the purpose of assessing standing is whether Yeager would have been hired as an apprentice if he had been randomly selected.

Yeager lacks standing because he would not have been selected as a Millwright apprentice even if his scores had been transferred to the Fabrication Plant. Yeager achieved a written examination score of thirty-three. Even if we assume, for the sake of argument, that Yeager would have achieved the maximum interview score of twenty-seven, his total score would have been sixty. In 1997, GMC hired two nonseniority white male Millwright apprentices and both had scores of sixty-four. Even if Yeager's scores had been transferred to the

Fabrication Plant he would not have been selected for a Millwright apprenticeship because the two nonseniority white males hired by GMC possessed superior qualifications (i.e., higher scores). Thus, Yeager lacks standing because he suffered no injury in fact. Therefore, the district court did not err when it granted summary judgment in favor of GMC on Yeager's Title VII claims regarding the Fabrication Plant.

D.

Finally, Yeager argues that GMC's refusal to hire him into its apprentice program violated his equal protection rights under the Fifth Amendment's Due Process Clause. Although Yeager's complaint does not say so, we assume that he is alleging his Fifth Amendment claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). *See also Davis v. Passman*, 442 U.S. 228, 235, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979) (holding that equal protection component of the Fifth Amendment's Due Process Clause gives rise to *Bivens* employment discrimination action). A *Bivens* action is a judicially created damages remedy designed to vindicate violations of constitutional rights by federal actors. 403 U.S. at 395-97. In *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996), this court held that private actors who cause constitutional injuries can be held liable for damages under *Bivens*, if their conduct is so related to the federal government that they can be regarded as federal agents or actors, that is, that the private corporation acted under color of federal law. *See also Hammons v. Norfolk S. Corp.*, 156 F.3d 701, 707 (6th Cir. 1998). Therefore, GMC's liability depends on whether GMC acted under color of federal law when it implemented its apprentice program.

GMC implemented its apprentice program as part of a Conciliation Agreement with the Equal Employment Opportunity Commission. The Agreement terminated by its own terms in 1988, before any of the events relating to Yeager's complaint occurred. Pursuant to Executive Order No. 11246, which requires government contractors to have affirmative action programs, GMC continued its apprentice program in compliance with the United States Department of Labor's Office of Federal Contract Compliance Programs. Executive Order No. 11246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C. §2000e note. The apprentice program is also registered with the Department of Labor's Bureau of Apprentice Training. Yeager argues that GMC's compliance with these government programs as part of its contractual relationship with the government establishes that GMC was acting under color of law, and, therefore, GMC should be considered a federal actor subject to Fifth Amendment constraints.

The district court determined that GMC's voluntary compliance with government regulations as part of its contractual relationship with the government did not support a finding of action under federal law. We agree.

Two federal district courts have considered this question and both held that a voluntary contractual relationship between a private corporation and the federal government does not make the private corporation an actor under color of federal law. In *McLaughlin v. Great Lakes Dredge & Dock Co.*, 495 F. Supp. 857 (N.D. Ohio 1980), the court determined that the defendant's implementation of an affirmative action program in compliance with Executive Order No. 11246 was voluntary and not federal action.

Likewise, in *Kipp v. LTV Aerospace & Def.*, 838 F. Supp. 289, 292 (N.D. Texas 1993), the court determined that a private party's implementation of a drug-testing program in compliance with its contractual relationship with the government was voluntary and not federal action.

In this case, GMC did not act under color of federal law. GMC voluntarily entered into its contract with the federal government, and its apprentice program was its own creation. GMC designed, implemented, and has always administered its apprenticeship program independently from the government. In addition, we note that Yeager cited no legal authority supporting his argument that GMC acted under color of federal law when it voluntarily implemented its apprentice program. Therefore, GMC did not act as an instrument of the federal government in administering its apprentice program and the Fifth Amendment does not apply to the conduct of GMC in this case.

IV. CONCLUSION

The district court did not err when it granted summary judgment in favor of GMC on Yeager's Title VII and Fifth Amendment claims. Therefore, we **AFFIRM** the district court's grants of summary judgment in favor of GMC.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:98CV2478

[June 30, 1999, Filed]

LEE YEAGER,	)
PLAINTIFF,	)
	)
v.	)
	)
GENERAL MOTORS CORPORATION,	)
DEFENDANT.	)
	)

PETER C. ECONOMUS,
UNITED STATES DISTRICT JUDGE.

OPINION

MEMORANDUM OPINION AND ORDER

On October 29, 1998, Plaintiff, Lee Yeager, filed the above captioned complaint against General Motors Corporation ("GM") alleging violations of Title VII of the Civil Rights Act and the Fifth Amendment of the United

States Constitution for not selecting him for its apprentice program. On April 29, 1999, Plaintiff filed a Supplemental Amended Complaint adding Title VII and Fifth Amendment claims relating to a different GM plant.

Defendant has filed a Motion for Partial Summary Judgment[1] on both of the Fifth Amendment claims and the original Title VII claim. For the following reasons, the Defendant's Motion is **GRANTED**.

I. FACTS

The following facts are uncontested. GM, pursuant to the collective bargaining agreement between itself and the International Union UAW ("UAW"), recruited individuals into its skilled trades apprentice training positions through jointly administered local apprentice programs, including one at the assembly plant and one at the fabrication plant at its Lordstown facility in Warren, Ohio. The apprentice training program relies on recruitment inside and outside any plant in which it is implemented. A local committee composed of GM and UAW representatives creates a list of applicants to undergo the application process. The "Applicant List" is partly composed of 100 non-seniority individuals who are randomly selected from among those showing interest. The committee also uses a special recruitment process to identify strong female and minority candidates who are added to this

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[1] On December 22, 1998, Defendant filed a Motion for Summary Judgment (Dkt. No. 12) on the claims relating to only one GM plant. Following Plaintiff's Supplemental Amended Complaint, Defendant renewed its motion as a Motion for Partial Summary Judgment (Dkt. No. 45).

list without going through the random selection.

After the random selection process, the first step for admission into the apprentice training program consists of application forms where the applicants list the skilled trade groups for which they wish to be considered. Next, the applicants must take a written test that evaluates their general abilities in areas such as mathematics and reading comprehension. Three lists are made of those who score in the top 30% each for minority applicants, women applicants, and white male applicants. The applicants on these lists may submit to an interview for which they receive another score.

Applicants are ranked based on the sum of these scores (their "Total Selection Points"), with the highest possible score being 72. The applicants' Total Selection Points are recorded on lists that are used for future apprentice selections. Separate lists are kept for seniority employees and non-seniority individuals.[2] For every two seniority employees offered apprenticeships, only one non-seniority applicant may be offered an apprenticeship.[3] These separate lists maintain

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[2] Non-seniority individuals include GM employees who do not have the necessary time and experience at the plant where they are applying, and persons like Plaintiff, who do not work for GM.

[3] Under this system, if only two apprenticeships are available, they both will be offered to seniority employees. Additionally, if only five apprenticeships are available, four will be offered to seniority employees and only one will be offered to a non-seniority individual. While Plaintiff makes no claims involving the favored treatment of seniority employees, it is important to note the relative number of seniority positions so as to demonstrate the limited number of slots for which Plaintiff competed.

a record of applicants' scores to determine who is selected when apprentice training positions become available.

However, these rankings are not static. Applicants' positions change under the following three circumstances: (1) as new applicants are tested and added to the list, (2) as applicants are selected for apprenticeships and taken off the list, and (3) on infrequent occasions when certain applicants are allowed to retest. Additionally, GM conducts a Pre-Apprentice Training Program ("PATP") for women and minority applicants whose scores are near the selection range. This program enables those applicants to increase their Total Selection Points by up to seven points.

Plaintiff is a non-seniority white male. He applied to the local apprentice program at the Lordstown Assembly Plant in 1989. He was among the candidates randomly selected for the Applicant List. He first took the apprentice test in 1989 and was interviewed in 1990 for his selected three positions: Truck Repair, Tool Making, and Pipefitting. He attained his highest Total Selection Points, 53, in Truck Repair. In 1991, four seniority positions and only one non-seniority position in Truck Repair became available. The last position was filled by a white male with a score of 68, fifteen points higher than Plaintiff. In 1993, a new apprentice class was selected, but only two seniority and no non-seniority positions opened in Truck Repair, and no one with a score under 56 was selected for any apprenticeship.

In 1996, Plaintiff exercised his option to retake the exam and changed his Truck Repair preference to Millwright. After the new interviews, he had Total Selection Points of 60 in Millwright, 57 in Tool Making, and 55 in Pipefitting. Later

that year, GM again sought apprentices for the Lordstown assembly plant to fill a total of fifty positions. There were thirteen seniority and six non-seniority apprenticeships available for Millwright, six seniority and three non-seniority for Pipefitting, and three seniority and one non-seniority for Tool Making. Plaintiff's Total Selection Points made him the 14th ranked non-seniority white male for Millwright, 24th for Pipefitting, and 36th for Tool Making. The preliminary list of the top fifty candidates for the apprentice positions was entirely composed of white males, and Plaintiff was not among them. After affirmative action considerations, 38 white males were accepted into the apprentice program. Women and minorities were selected who had scores lower than Plaintiff's before affirmative action considerations.[4]

In 1997, Plaintiff applied to also be considered for the apprentice training program at the Lordstown fabrication plant, which is a separate plant with a separate program from that at the Lordstown assembly plant. The programs are handled separately, except that any applicants already scored at another plant will have their old score used in the new selection process. However, applicants at a new plant must again go through the random selection process to even have their scores considered with the other applicants' scores. Plaintiff was placed in the random selection process to see if he would be one of the 100 non-seniority individuals put on the Applicant List. He was not selected for consideration at the fabrication plant; however, he remains ranked on the list

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[4] Of the twelve women and minorities that were selected, not all were in positions Plaintiff had selected. Additionally, some of these 12 people had "seniority" status.

at the assembly plant.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) governs summary judgment and provides, in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

The party moving for summary judgment bears the burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the evidence submitted must be viewed in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

"The burden on the moving party may be discharged if the moving party demonstrates that the non-moving party has failed to establish an essential element of his or her case for which he or she bears the ultimate burden of proof at trial." *Morales v. American Honda Motor Co., Inc.*, 71 F.3d 531, 535 (6th Cir. 1995). If the moving party meets this burden, then the non-moving party must present more than a scintilla of evidence in support of his or her position. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary judgment must

be granted unless there is sufficient evidence favoring the non-moving party for a judge or jury to return a verdict for that party. *Id.* at 249, 106 S. Ct. 2505.

III. ANALYSIS

Defendant's motion for summary judgment raises two issues that will be discussed in turn: (A) whether Plaintiff has standing to raise a Title VII claim and (B) whether the policies and procedures of GM constitute action under color of law and should be susceptible to Fifth Amendment claims.

A. Standing

Standing is part of the case-or-controversy requirement of Article III of the Constitution. It has three necessary elements, as explained in *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*: (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. 508 U.S. 656, 663-64; 113 S. Ct. 2297, 2302; 124 L. Ed. 2d 586, 595-96 (1993). Plaintiff suggests several different injuries with respect to the Lordstown assembly plant, all of which relate to PATP, and Plaintiff contends that he has not received an apprenticeship because his positions on the selection lists have been unjustly shifted since he has been excluded from PATP based on his race and sex. He presents three potential injuries.

First he argues that not receiving the apprenticeship satisfies the injury-in-fact requirement because the interest in being hired or admitted to a training program is an interest

protected in certain circumstances. In *Brunet v. City of Columbus*, a case involving firefighter applicants protesting a gender-based affirmative action arrangement, the court stated that for affirmative action cases, the plaintiff must establish that, "but for the program, he would have been considered for the job, to satisfy standing requirements." 1 F.3d 390, 396 (6th Cir. 1993). GM has provided ample evidence that even before affirmative action was applied Plaintiff was well below the cut-off point. Therefore, Plaintiff was not unseated from any position or consideration by affirmative action. This eliminates any causal connection between the affirmative action system Plaintiff is challenging and his injury in failing to enter the apprentice program. Thus, he has failed to demonstrate the second and third elements of standing, i.e. causation and redress, as he would not have been given an apprenticeship even in the absence of an affirmative action program.

Plaintiff also suggests that redress for this injury could come from granting him the seven PATP bonus points that women and minorities were eligible to receive, which would elevate his score into the selection range. However, if Plaintiff's proposal were implemented, it would have to apply to all white male applicants, including all of those ahead of Plaintiff on the selection list. Once again, he would fall below the selection range. Therefore, he lacks standing to challenge GM's affirmative action plan.

Plaintiff also asks this Court to consider the injury caused by his ranking for future apprentice selections. He believes that future candidates who receive affirmative action considerations may unjustly supercede him as he rises toward a more favorable hiring position. He essentially argues that

his standing stems from the injury that he will suffer in the future. The injury-in-fact requirement cited in Brunet, *supra*, requires that the injury be "actual or imminent, not conjectural or hypothetical." *Id.* Even if he knew that his name would be the next one selected for an apprenticeship, his injury would still not be imminent, since GM operates both its apprentice program and PATP at will and may decide to discontinue both programs at the Lordstown assembly plant. Moreover, future unadjusted applicants might perform as well as past applicants who scored higher than the Plaintiff and prevent him from entering the program regardless of the affirmative action program. With such uncertainties, Plaintiff's injury is merely conjectural, and does not grant him standing.

Finally, Plaintiff believes that his exclusion from PATP was itself an injury, thereby giving him standing. He relies on *University of California Regents v. Bakke*, where a white man applied to a medical school where 16 of 100 seats were reserved for disadvantaged minority students. 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In *Bakke*, the Supreme Court ruled that it was not necessary for Bakke to show that he would have been admitted without the barrier, because a plaintiff has standing in such a case if he is not given the opportunity to compete for all of the available slots. *Id.* at 281, 98 S. Ct. at 2743, 57 L. Ed. 2d at 765, n. 14. Since all white males are barred from participation in PATP, Plaintiff insists that he has standing under *Bakke*.

It is true that discrimination with respect to training programs is forbidden under Title VII, 42 U.S.C. § 2000e-2(d) (1994). Thus, if there is an exclusion from available seats in a training program, that would establish standing under

Bakke. Two factors lead this Court to reject applying *Bakke* to the instant case. First, PATP is not a training program. Rather PATP is a system affording women and minorities the opportunity to earn. up to seven bonus points. Applicants are selected for PATP based on how close their scores are to the selection range, not on any real measuring of skill or need for training. Also, the manner in which points are added to the applicant's Total Selection Points suggests a motive for Pre-Apprentice Training other than education. The bonus that is granted at the end of the program is a value based on performance on a test of the same nature as the original written test taken during the application process. This addition is computed in such a way that even if the applicant's score on the test decreases, his Total Selection Points increase. This suggests that the purpose of the evaluation at the end of the program is not to truly re-assess the applicant's ability, but to increase the applicant's score.

Independent of this Court's analysis of the program, Plaintiff in his own complaint does not treat PATP as training. Plaintiff's formulation of his monetary demand suggests that admission to the apprentice program would have improved his career marketability and his subsequent salary, but he makes no similar claims about PATP. When he addresses the advantages he would have gained from PATP, he does so only in terms of addition to his Total Selection Points, not in terms of education. While this appears to be only a nominal distinction, it goes directly to the issue of redress.

If Plaintiff's interest in PATP is not based on its educational value, then his redress in terms of being allowed to participate must be from the points he can gain from Pre-

Apprentice Training. Once again, there is no redress here since allowing him those points would allow all white male applicants those points, and his ranking would not be advanced.

Without demonstrating that PATP is an educational program, Plaintiff cannot show that he has been barred from participating in a program to which he is entitled. Absent such a showing, he cannot apply the *Bakke* rule. Therefore, he must still to show causation and redress relative to the apprenticeships he did not get. He has not established these elements. Consequently, Plaintiff has failed to establish standing in his Title VII claims relating to the Lordstown assembly plant.[5]

B. Color of Law

Plaintiff raises claims at both plants under the Fifth Amendment of the United States Constitution, specifically, the equal protection implied by its due process clause. Where the Fifth Amendment protects individuals from the federal government depriving them of life, liberty, or property without due process, it also protects from such intrusions by individuals acting in the place of the government. If GM was acting under color of law, then its actions can be attributed to the federal government, and it can be held to Fifth Amendment standards. Through reasoning akin to that of the Supreme Court in *Paul v. Davis*, this Court may generally use the standards of Fourteenth Amendment equal protection

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[5] Defendant has not moved for summary judgment on Plaintiff's Title VII claim pertaining to the Lordstown fabrication plant.

cases to determine who acts under color of law for Fifth Amendment purposes. 424 U.S.C. 693, 702 n.3 (1976).

The Defendant in this case originally implemented its affirmative action program as part of a Conciliation Agreement with the Equal Employment Opportunity Commission. That agreement terminated by its own terms in 1988, before any of the events relevant to Plaintiff's complaint occurred. Pursuant to Executive Order No. 11246, which requires government contractors to have affirmative action programs, GM continued this plan after the date of termination in compliance with the U.S. Department of Labor, Office of Federal Contract Compliance Programs. Moreover, the program is registered with the Department of Labor's Bureau of Apprentice Training. Plaintiff argues that this compliance establishes that Defendant was acting under color of law, and Defendant should, thus, be considered a federal actor subject to Fifth Amendment constraints.

Plaintiff's argument is loosely based on *Lugar v. Edmonson Oil Co.*, which recognizes action under color of law when the private individual or company is acting with the authority of the state. 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). Plaintiff also cites *Hammons v. Norfolk Southern Corp.*, where a railroad company was performing drug testing as required of all railroad companies by federal law. 156 F.3d 701 (6th Cir. 1998). A railroad regulation such as the one in *Hammons* forces a company to act in an enforcement capacity for a federal law, while the Executive Order upon which GM's plan is premised is to be complied with voluntarily. *See McLaughlin v. Great Lakes Dredge & Dock Co.* 495 F. Supp. 857 (N.D. Ohio 1980) (Defendant's implementation of a plan filed to comply with Executive

Order No. 11246 was voluntary). It is unnecessary for GM to contract with the federal government, and, therefore, it is free to choose not to use or register an affirmative action system. Therefore, GM is not acting under color of law, and the Fifth Amendment claims must fail.

IV. CONCLUSION

Because Plaintiff would not have been selected for an apprenticeship even in the absence of the affirmative action program, he lacks standing to bring a Title VII claim regarding the Lordstown assembly plant. Plaintiff has also failed to establish a prima facie case of a Fifth Amendment violation, as Defendant's affirmative action program was voluntary and, thus, not implemented under color of law. Accordingly, Defendant's Motion for Partial Summary Judgment (Dkt. No. 45) is **GRANTED**.

IT IS SO ORDERED.

/s/_____
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO.4:98CV2478

[December 20, 1999, Filed]

LEE YEAGER, *PLAINTIFF*,

v.

GENERAL MOTORS CORPORATION, *DEFENDANT*.

JUDGE PETER C. ECONOMUS

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the Motion of the Defendant, General Motors Corporation ("GM"), for summary judgment on Count Three of the Plaintiff's Supplemental Amended Complaint (Dkt.#59). Count Three of the Plaintiff's Supplemental Amended Complaint (Dkt.#40) alleges a violation of 42 U.S.C. §2000e, Title VII by the Defendant at its Lordstown Fabrication Plant ("Fabrication Plant").

For the following reasons, the Defendant's Motion for Summary Judgment on Count Three of the Supplemental Amended Complaint (Dkt.#59) is **GRANTED**.

FACTS

The following facts are not in dispute. GM, pursuant to the collective bargaining agreement it entered into with the International Union UAW ("UAW"), has established an apprentice training program to recruit applicants into a jointly administered four year apprentice training program to prepare individuals for positions in specific trades. GM finds applicants for its apprentice training positions by publishing notices in the community containing information about the program and the application process. Additionally, GM seeks interested and qualified minority and female applicants through its contacts with local minority and female employment organizations.

Persons interested in the apprentice program must go to the Fabrication Plant and fill out an application, or Request for Information ("RFI"), listing the top three skilled trades for which they want to be considered. The number of RFI's taken during a given hiring period is usually limited by GM, and applicants are permitted to fill them out on a first-come, first-served basis.

Once GM has received the RFIs, they are sent to an independent testing firm which conducts a random draw until a specified number of applications have been chosen. Those persons whose RFIs are selected in the random draw are given an opportunity to sit for the written apprentice exam. The written exam is used to rank applicants to help determine

those who will eventually be hired. If an applicant has previously taken an apprentice exam at another GM plant, and that applicant is selected in the random draw, he or she may have the previous test score transferred.

GM invites a number of minority and female candidates, or targeted persons, to sit for the apprentice exam after those applicants from the random draw have been chosen. The number of applicants chosen from the random draw is not affected by GM's recruitment of minorities and women to take the apprenticeship exam. Aside from the targeted individuals, all other applicants who completed RFIs, whether minorities, women, or men, must be chosen in the random draw in order to sit for the apprentice exam.

The apprentice exam is administered to each of the applicants for the apprentice program, including targeted individuals and those chosen in the random draw. The scores earned on the apprentice exam are then used to rank applicants to assist GM in determining which should be offered positions in the apprentice program. Those individuals who score in the top thirty percent nationally on the apprentice exam are offered interviews for the trades they selected on their RFIs. The applicants' exam scores are combined with interview scores to arrive at a final score which GM uses to rank applicants and make final hiring decisions.

The Plaintiff is a white male applicant for the apprentice training program at GM's Lordstown Fabrication Plant. In September 1997, when the Plaintiff filled out his RFI, GM had already determined that 100 persons would be chosen in the random draw to take the apprentice exam. The

Plaintiff's RFI was not selected in the random draw.

In 1997, GM, in addition to selecting 100 applicants in the random draw, chose twenty-two qualified minority and female applicants to take the apprentice exam. Nine other individuals were offered an opportunity to take the apprentice exam a second time. A total of 130 applicants took the exam. None of the minority or female applicants displaced any of the randomly drawn applicants such that anyone who was randomly drawn was prohibited from taking the apprentice exam.

There are additional rules which govern who may take the apprentice exam. Most importantly, GM maintains a policy that an applicant to the apprentice program may take the apprentice exam a maximum of two times. Before an applicant can take the exam a second time, he must provide GM with information showing that he has received additional schooling or training in relevant fields. Only if an applicant meets this requirement will he be given an opportunity to sit for the apprentice exam a second time. Even if an applicant has completed additional schooling or training in a relevant field, he will not be permitted to take the apprentice exam a third time. This policy applies to all applicants; race or sex are not factors.

The Plaintiff would not have been eligible for the apprentice exam in 1997, had he been randomly draw, because he had taken the apprentice exam in 1989 and 1996, at GM's Lordstown Assembly Plant ("Assembly Plant"). The Plaintiff, therefore, did not qualify to take the apprentice exam when he applied again in 1997. Furthermore, even if the Plaintiff was randomly drawn and sought to have his

previous score of 33 transferred from the Assembly Plant to the Fabrication Plant, a maximum score of 27 in the interview phase would have given him a total score of 60 points. Out of the 1997, apprentice class, GM hired two non-seniority applicants who were white males who each scored 64. The Plaintiff's possible score of 60 would have ranked him below the candidates selected by GM.

STANDING

Article III of the Constitution requires that a case or controversy exist before a federal court can exercise jurisdiction over a matter. Standing is a part of the case or controversy requirement. To have standing, a plaintiff must satisfy three elements: "(1) an injury in fact... (2) a causal relationship between the injury and the challenged conduct ... and (3) a likelihood that the injury will be redressed by a favorable decision." *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993).

A plaintiff must allege an injury that is "concrete and particularized... and actual or imminent, not conjectural or hypothetical." *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996) *(citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (quotations omitted). The Plaintiff argues that, based upon his race and sex, he was not targeted for placement among those taking the apprentice exam and was not able to compete for an apprentice position. *(See* Plaintiff's Conditional Memorandum Contra Def. GM's Mot. for Summ. J. at 6.) The Plaintiff cites *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978), for the proposition that an individual is injured for standing

purposes when he is not permitted to compete for a position in a class because of race or sex. *Id.* at 280-81, n.14.

The Plaintiff's reliance on *Bakke* in this instance, however, is misplaced. The Sixth Circuit has held that in reverse discrimination cases, a plaintiff may satisfy standing requirements where, "but for the [women and minority recruitment] program, he would have been considered for the job." *Brunet v. City of Columbus*, 1 F.3d 390, 397 (6th Cir.) *cert. denied Brunet v. Tucker*, 510 U.S. 1164, 114 S.Ct 1190 (1994). Contrary to the Plaintiff's assertions, the mere fact that the Defendant recruited women and minority applicants to sit for the apprentice exam did not affect the Plaintiff's ability to compete for an apprentice position. The Defendant's recruitment efforts only increased the number of persons taking the apprentice exam after one hundred applicants were randomly drawn. The inclusion of specifically recruited minority and female applicants did not exclude any other RFI applicant from the exam. Therefore, the Plaintiff was not prevented from competing for an apprentice exam seat by the Defendant's minority and female recruitment policy. Accordingly, the Plaintiff has no present injury for the purposes of standing and cannot bring his Title VII claim before this Court.

Additionally, the Plaintiff has not established that any imminent harm will come to him as a result of the Defendant's continuing administration of the apprentice program and their efforts to recruit minority and female test-takers. The Plaintiff is prospectively barred from competing for an apprentice position not based upon his race or sex, but by the Defendant's non-discriminatory apprentice program policies. As such, the Plaintiff lacks standing to bring his

Title VII claim before this Court because he will not suffer any future harm from the Defendant's current policies.

Even if the Plaintiff can show that he suffered a particular injury, he cannot establish a causal relationship between that injury and the Defendant's challenged conduct. For a causal relationship to exist, the Plaintiff's injury must be "fairly trace[able] to the challenged action of the defendant." *Kardules*, 95 F.3d at 1346 *(citing Lujan, supra)* (quotations omitted). The Plaintiff argues that the Defendant's failure to target him for the apprentice exam based on his sex and race caused his alleged injury. *(See* Plaintiff's Conditional Memo. at 6.) The targeting, therefore, is the Defendant's challenged conduct. Aside from their recruitment efforts, the Defendant maintained a policy that no one, regardless of race or sex, could re-take an apprentice exam more than two times. Although the Plaintiff was not targeted, he would not have been selected anyway because he had already taken the test the maximum number of times.

Furthermore, the Plaintiff would not have been accepted into the apprentice program had his previous apprentice exam score at the Assembly Plant been transferred to the Fabrication Plant. The Plaintiff's Assembly Plant score was 33. If the Plaintiff had achieved a maximum interview score of 27, he would have a total score of 60. Based on his maximum potential score alone, the Plaintiff would not have been hired because the two candidates who were hired from the 1997, apprentice class each scored 64. Neither the Plaintiff's race and sex, nor the Defendant's recruitment policy, therefore, had any effect on the Plaintiff's application for the apprentice program. Accordingly, there is no causal connection between the Plaintiff's alleged injury and any

action or policy of the Defendant. Assuming that the Plaintiff can establish the first two elements of standing, there is no remedy that this Court can fashion that will redress the Plaintiff's alleged injury. Although the Court is not making a finding whether the Defendant's apprentice program was discriminatory, if such a finding was made, the Plaintiff's alleged injury would not be redressable. There are at least two non-discriminatory reasons why the Defendant did not select the Plaintiff for the open apprentice positions: (1) the Plaintiff took the apprentice exam the maximum number of times and did not meet the eligibility requirements; and (2) had the Plaintiff's best score at the Assembly Plant been transferred to the Fabrication Plant, it was still lower than the scores of the non-seniority white males hired by the Defendant in the 1997, apprentice class.

Accordingly, the Plaintiff lacks standing to bring his claims before this Court. This Court lacks jurisdiction to hear the Plaintiff's claims and the Defendant's Motion for Summary Judgment (Dkt.#59) is GRANTED.

IT IS SO ORDERED.

/s/_____

PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §2000e-2(a):

"Employer practices
It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. §2000e-2(d):

"Training programs
It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against

any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

In pertinent part, Title 41, Part 60, CFR, §60-1.1:

"The purpose of the regulations in this part is to achieve the aims of parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts, the regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part .... The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the equal opportunity clause regardless of whether or not his contract contains a 'Disputes' clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all of the sanctions authorized by the order..."

Title 29, Part 30, CFR, §30.1:

"This part sets forth policies and procedures to promote equality of opportunity in apprenticeship programs registered with the U.S. Department of Labor and in state apprenticeship programs registered with recognized state apprenticeship agencies. These policies and procedures apply to the recruitment and selection of apprentices, and to all conditions of employment and training during apprenticeship. The

procedures established provide for review of apprenticeship programs, for registering apprenticeship programs, for processing complaints, and for deregistering noncomplying apprenticeship programs. This part also provides policies and procedures for continuation or withdrawal of recognition of state agencies for registering of apprenticeship programs for Federal purposes. The purpose of this part is to promote equality of opportunity in apprenticeship by prohibiting discrimination based on race, color, religion, national origin, or sex in apprenticeship programs, by recruiting affirmative action to provide equal opportunity in such apprenticeship programs, and by coordinating this part with other equal opportunity programs."

U.S. Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX E

GM
North American Operations

May 7, 1997

Mr. Dave Beck
US Department of Labor
Bureau of Apprenticeship and Training
City Center One, Suite 410
100 Federal Plaza East
Youngstown, OH 44503

Dear Dave:

In line with our conversation regarding the Yeager case, the following are the current availability and utilization figures for the Millwright, Pipefitter, Toolmaker and Truck Repair trades at the Lordstown Assembly Plant.

	Minorities	
Trade (Population.)	Utilization	Availability
Millwright (103)	(16) 15.5%	5.3%
Pipefitter (85)	(9) 10.6%	2.8%
Toolmaker (75)	(5) 6.7%	0.7%
Truck Repair (25)	(4) 16.0%	5.4%

	Females	
Trade (Population.)	Utilization	Availability
Millwright (103)	(3) 2.9%	1.8%
Pipefitter (85)	(7) 8.2%	2.8%
Toolmaker (75)	(4) 5.3%	2.0%
Truck Repair (25)	(1) 4.0%	0.0%

I trust this information will prove helpful to you. If I may be of any further assistance in this matter please feel free to contact me.

/s/_____
Dan L. Pedigo
Apprentice Coordinator

CONFIDENTIAL

LORDSTOWN ASSEMBLY